INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	6
Reasons for granting the writ	6
Appendix A (Federal statutes and regulations involved)	15
Appendix B (Mass. Special Acts, 1918, c. 159)	17

CITATIONS

Cases:

Bass v. *Group No. 1 Oil Corp.*, 41 F. (2d) 483, affirmed, 283 U.S. 279	11
Blair v. *Byers*, 35 F. (2d) 326	8
Boston Elevated Ry. Co. v. *Malley*, 288 Fed. 864	10
Boston Elevated Ry. Co. v. *Malley*, 24 F. (2d) 758	10
Burnet v. *McDonough*, 46 F. (2d) 944	13
Cleveland Railway Co. v. *Commissioner*, 36 F. (2d) 347, certiorari denied, 281 U.S. 743	11
Commissioner v. *Sherman*, C.C.A. 1st, decided March 14, 1934	12
Flint v. *Stone Tracy Co.*, 220 U.S. 107	6
Haight v. *Commissioner*, 52 F. (2d) 779	13
Hobart Iron Co. v. *Commissioner*, 29 B.T.A. 855	11
Lewis v. *Commissioner*, 47 F. (2d) 32	13
Lucas v. *Howard*, 280 U.S. 526	13
Lucas v. *Reed*, 281 U.S. 699	13
Miller v. *McCaughn*, 27 F. (2d) 128	9
Register v. *Commissioner*, C.C.A. 5th, decide dMarch 10, 1934	13
State of Ohio v. *Helvering*, No.——, Original	12
South Carolina v. *United States*, 199 U.S. 437	6, 13
State of North Dakota v. *Olson*, 33 F. (2d) 848, appeal dismissed, 280 U.S. 528	7
United States v. *Dakota-Montana Oil Co.*, 288 U.S. 459	8
Wanless Iron Co. v. *Commissioner*, 29 B.T.A. 843	11

50903—34——1

CONTENTS—Continued

Statutes:	Page
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 212 (U.S.C.App., Title 26, Sec. 953)	15
Sec. 213 (U.S.C.App., Title 26, Sec. 954)	15
Revenue Act of 1928, c. 852, 45 Stat. 791, 797:	
Sec. 21	15
Sec. 22	15
Massachusetts, Special Acts and Resolves, 1918, c. 159	17
Miscellaneous:	
Treasury Regulations 69, Art. 88	7, 16
Treasury Regulations 74, Art. 643	16
Treasury Regulations 77, Art. 643	8

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

LELAND POWERS, EXECUTOR, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit, entered in the above cause on January 9, 1934, reversing decisions of the Board of Tax Appeals.[1]

[1] The case involves the tax liability of five taxpayers. Five proceedings were begun before the Board; the cases were there consolidated and heard together. Five petitions for review were filed in the court below, but these were consolidated, and one judgment was entered. Accordingly, a single petition for certiorari is filed in this Court.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 81–84) is reported in 68 F. (2d) 634. The findings of fact and opinion of the Board of Tax Appeals (R. 24–40) are reported in 26 B.T.A. 1381.

JURISDICTION

The judgment of the court below was entered January 9, 1934. (R. 84.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the income received by the taxpayers as trustees of the Boston Elevated Railway Company was exempt from Federal taxation on the ground that such a tax would be an unconstitutional burden on the State.

STATUTES AND REGULATIONS INVOLVED

The Federal statutes and regulations involved are set forth in Appendix A (*infra,* pp. 15–16). The material portions of the Special Act of the Massachusetts Legislature providing for the public operation of the Boston Elevated Railway Company are set forth in Appendix B (*infra,* pp. 17–26).

STATEMENT

The facts as found by the Board of Tax Appeals (R. 24–29) may be summarized as follows:

Prior to 1926 the taxpayers were appointed trustees of the Boston Elevated Railway Company

under the provisions of Chapter 159 of the Special Acts of 1918 of the Commonwealth of Massachusetts, "An Act to Provide for the Public Operation of the Boston Elevated Railway Company." The material portions of this Act are set out in Appendix B, *infra,* p. 17.

Under this Special Act the State, with the consent of the company, took over the management and operation of the railway and the properties of the company in return for guaranteed dividends on its stock and interest on its obligations. The property remained at all times that of the company, the State taking over only the management and operation, which was to continue for a period of ten years or such extended period as might be determined. There was created a board of trustees, consisting of five persons to be appointed by the Governor with the advice and consent of the Executive Council, to manage and operate the railway and to hold possession of the properties of the company on behalf of the State during the period of public operation. The trustees were appointed for a term of ten years and it was provided (Sec. 1) that each should receive "from the company" an annual salary of $5,000. The trustees were vested with all the rights and powers of the company and its directors, were authorized to receive and disburse its income and funds, and determine the service and facilities to be furnished, in which latter respects their authority was exclusive of control

by any other state Board or Commission. It was provided that the trustees should not be considered public officers for certain purposes, and (Sec. 2) in the management and operation of the company and its properties they should "be deemed to be acting as agents of the company and not of the commonwealth."

The trustees were authorized to fix such rates of fare as reasonably necessary to produce sufficient income to meet the cost of service including therein, among other items referred to, dividends on the stock. Out of the bond issue authorized to be made by the company the trustees were to set up a reserve fund to pay the cost of service when revenues were inadequate, with provision that semiannually any deficiency in the reserve fund for that purpose would be supplied by the State and at like periods any excess of the reserve fund over the original amount should be applied to reimburse the State for amounts paid to the company. Such amounts as the State might be required to pay the company were to be obtained by assessment, in addition to state taxes, proportionately upon the cities and towns served by the company and any excess revenues repaid to the State were to be distributed proportionately to such cities and towns. Upon termination of public management and operation the company was authorized to take over the management and operation. Upon resumption of private operation the company was to

fix and collect such reasonable fares as would produce sufficient income to pay the cost of service, to the same extent as the trustees were so authorized, with authority also to establish schedules of fares automatically increasing or decreasing in the same manner as authorized in the case of the trustees. After the return of control to the company, however, the State no longer was obligated to supply any deficiency in income. It was provided that public regulation and supervision of the company after resumption of private operation should not be exercised so as to reduce the income below the reasonable cost of service as defined, which included dividends on stock and interest on obligations.

In 1919 a deficiency of $3,980,151.67 was incurred from public operation of the railway, which amount the State obtained by apportionment among the cities and towns served and paid it to the company in accordance with its obligation under the Act. The excess revenues from operations up to and including 1929 were insufficient to fully reimburse the State and cities and towns for the sum so paid.

During the respective taxable years each taxpayer was a trustee of the Boston Elevated Railway and received a salary of $5,000 per year, under the Special Act. The Commissioner determined that the salary so received by each taxpayer was

taxable income and asserted a deficiency against each taxpayer for the respective years.

The Board of Tax Appeals sustained the Commissioner (R. 40), but this decision was reversed by the Circuit Court of Appeals (R. 84).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the taxpayers as trustees of the Boston Elevated Railway Company, having been appointed under a Special Act of the Massachusetts legislature providing for public management and operation of the railway properties, were exercising essential governmental functions of the State and hence their salaries were exempt from Federal taxation.

2. In holding that the compensation received by the taxpayers as such trustees was not subject to the Federal income tax.

3. In holding invalid the provisions of Article 88 of Treasury Regulations 69.

4. In reversing the decisions of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision below extends the doctrine of implied exemption beyond its proper scope and in so doing is apparently in conflict with the decisions of this Court in *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, and *South Carolina* v. *United States*, 199 U.S. 437. In the *Stone Tracy* case, this Court said (p. 172):

> It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water, and the like. * * *
>
> The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character.

The decision also appears to be in conflict in this respect with the decision of the Circuit Court of Appeals for the Eighth Circuit in *State of North Dakota* v. *Olson*, 33 F. (2d) 848, appeal dismissed, 280 U.S. 528. In that case the court pointed out (p. 852) that there is a distinction between "public purpose" and "governmental purpose", a distinction which the court below appears to have ignored.

2. The decision below holds invalid an important regulation promulgated by the Treasury Department for the administration of the tax laws. In Article 88 of Regulations 69, it is provided:

> ART. 88. *Compensation of State officers and employees.*—Compensation paid to its officers and employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or political subdivision, including fees received by notaries public commissioned by States and the commissions of receivers appointed by State courts, is not taxable. Compensation received for services rendered to a State or

> political subdivision thereof is included in gross income unless (a) the person receives such compensation as an officer or employee of a State or political subdivision, and (b) the services are rendered in connection with the exercise of an essential governmental function. * * *

Article 643 of Regulations 74 and Article 643 of Regulations 77, promulgated under succeeding Revenue Acts, are the same. The regulation, therefore, has received the approval of Congress through reenactment of the statute upon which it is based. *United States* v. *Dakota-Montana Oil Co.*, 288 U.S. 459, 466.

The court below held this regulation invalid, saying (R. 83) that it was aware of no "precedent for such discrimination in exemption as is set up by the regulation." The "discrimination" referred to was, of course, the distinction made between services rendered in connection with the exercise of an essential governmental function and services not rendered in connection with such a function. This distinction finds its basis in the explicit decisions of this Court in *South Carolina* v. *United States, supra,* and *Flint* v. *Stone Tracy Co, supra.* In denying the validity of this distinction, the decision below is in conflict with these two decisions of this Court, and also with the decision in *Blair* v. *Byers,* 35 F. (2d) 326 (C.C.A. 8th).

3. The decision below is erroneous. The statute of Massachusetts under which the taxpayers

were appointed specifically provided that each should "receive *from the company* as compensation for his services five thousand dollars annually." (Italics ours.) The compensation in question, therefore, was not paid by the Commonwealth of Massachusetts, but by the company. In holding that the payments were nevertheless exempt from Federal taxation, the decision below is inconsistent with *Miller* v. *McCaughn*, 27 F. (2d) 128 (C.C.A. 3d).[2]

In Section 2 of the statute (*infra*, p. 18) it was provided that in the management and operation of the property, the trustees should "be deemed to be acting as agents of the company and not of the commonwealth." It was also provided in the same section that—

---

[2] The court below seeks to avoid this question by saying that during the period in question the Railway Company was indebted to the Commonwealth, that the deficits had been collected out of taxation, "and may well be regarded as having been paid by the public" (R. 84). But the advances by the Commonwealth were, as the court says, debts of the company. The salaries, therefore, were no more paid by the Commonwealth than the salaries of officers of a business corporation are paid by its bondholders or other creditors. The primary obligation was on the company. Though the Commonwealth made up the deficit, it expected reimbursement. Moreover, there is nothing whatever in the record to show that the company operated at a deficit during the years in question, or in any year other than 1919. (See R. 29.) There is consequently no basis for saying that the particular salaries here involved were not paid by the company and by the company alone.

> Nothing herein contained shall be held to affect the right of the commonwealth or any subdivision thereof to tax the company or its stockholders in the same manner and to the same extent as if the company had continued to manage and operate its own property.

These provisions of the statute show plainly enough the nature of the positions held by the trustees. They were "agents of the company and not of the commonwealth." The provision that the Commonwealth and its subdivisions should retain the right to tax the property shows that the Commonwealth itself did not regard the operation of the railroad as one of its normal functions. As the court said in *Boston Elevated R. Co.* v. *Malley,* 24 F. (2d) 758, 759 (D.Mass.), concerning the same provision of the statute—

> It would be a curious arrangement under which the corporation continued to be fully taxable as such for the benefit of the commonwealth, while it escaped taxation by the federal government.

In this decision and in *Boston Elevated R. Co.* v. *Malley,* 288 Fed. 864 (D.Mass.), it was held that the Boston Elevated Railway Company itself was subject to Federal taxation. The decision below is therefore contrary to these decisions.* The deci-

* The effect of the decision below is, of course, to overrule these two decisions, since they are by District Courts in the same Circuit.

sion is also contrary in this respect to the decisions of the Board of Tax Appeals in *Wanless Iron Co.* v. *Commissioner,* 29 B.T.A. 834, and *Hobart Iron Co.* v. *Commissioner,* 29 B.T.A. 855. In these cases it was held that the income of a lessee of State ore lands was subject to Federal taxation where the lease contained a provision that the lands should be subject to taxation as if they were owned in fee by the lessee. Cf. *Bass* v. *Group No. 1 Oil Corp.,* 41 F. (2d) 483 (C.C.A. 5th), affirmed on other grounds, 283 U.S. 279.

The court below seems to have based its decision largely on the ground of the authority conferred on the trustees to fix rates and to declare deficits which were to be collected through taxation. (See R. 83.) But the basis upon which the rates were to be fixed was provided for in detail in the Act itself. See Sections 6–11 (*infra,* pp. 20–23). Cf. *Cleveland Railway Co.* v. *Commissioner,* 36 F. (2d) 347 (C.C.A. 6th), certiorari denied, 281 U.S. 743. The trustees were given substantially no discretion, and were not required to make determinations on questions involving the exercise of judgment, such as the valuation of the property. The authority conferred on the trustees in this respect was essentially the same as the authority conferred on the company itself when private operation should be resumed. See Section 15 (*infra,* pp. 25–26). The trustees had no power to levy taxes. They could only certify the amount of any deficit to the Treas-

urer and Receiver General of the Commonwealth, and the State imposed the necessary tax. The primary duty of the trustees was to operate the railroad and at rates of fare which would meet all charges. The operation was for private profit, for under the Special Act the trustees were to declare dividends "upon the preferred and common stock of the company, and provide for the payment of the same." Sec. 3 (*infra,* p. 20); see also Sec. 6 (*infra,* pp. 20–21).

4. The decision below, if allowed to stand, will greatly increase the field of exemption of state instrumentalities from Federal taxation. It is obvious, therefore, that the decision presents a question of considerable public importance, representing, as it does, another instance of the growing tendency of some of the lower Federal courts to extend the doctrine of implied immunity to such a degree that, if unchecked, the Federal revenue will be materially affected.[4] Some of the States, since the repeal of the Eighteenth Amendment to the Constitution, have undertaken the sale of liquor through state dispensaries, and the State of Ohio has already sought leave from this Court to file a bill in equity seeking to enjoin Federal officers from taxing this enterprise carried on by the State. *State of Ohio* v. *Helvering,* No. —, Original.

[4] A similar question was involved in *Commissioner* v. *Sherman*, C.C.A. 1st, decided March 14, 1934, in which the court below also held the income exempt from Federal taxation.

Other States have created boards or commissions for the operation of ports or terminal facilities. The power of the Federal Government to tax these activities and the agencies employed in conducting them is already being questioned. The court below recognized "the present tendency to extend the field of governmental activities" in its opinion (R. 83), and seemed to regard this tendency as a reason for extending the sphere of tax exemption. Yet, it was this extension of governmental activity with its accompanying threat to the Federal revenues which was the very basis of this Court's decision in *South Carolina* v. *United States,* 199 U.S. 437, 454–455, 457.

This Court has recently granted writs of certiorari on the Government's petition in two similar cases, both of which were reversed *per curiam*. *Lucas* v. *Howard,* certiorari granted, 279 U.S. 830, reversed, 280 U.S. 526; *Lucas* v. *Reed,* certiorari granted, 280 U.S. 549, reversed, 281 U.S. 699. The decisions of this Court in those cases have served largely to put to rest questions of the taxability of income received by a taxpayer from a State for services as special counsel or the like. See, e.g., *Burnet* v. *McDonough,* 46 F. (2d) 944 (C.C.A. 8th); *Lewis* v. *Commissioner,* 47 F. (2d) 32 (C.C.A. 3d); *Haight* v. *Commissioner,* 52 F. (2d) 779 (C.C.A. 7th); *Register* v. *Commissioner,* C.C.A. 5th, decided March 10, 1934. A decision by this Court in the present case is required to remove the

uncertainty and confusion which is bound to follow from the decision of the court below striking down the distinction for tax purposes, so far as officers are concerned, between essential governmental functions and other activities carried on by a State.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

APRIL 1934.

APPENDIX A

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 212. (a) In the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by sections 214 and 206.

* * * * *

(U.S.C.App., Title 26, Sec. 953.)

SEC. 213. For the purposes of this title, except as otherwise provided in section 233—

(a) The term "gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property * * * or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.

* * * * *

(U.S.C.App., Title 26, Sec. 954.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 797:

Sections 21 and 22 (a) of the Revenue Act of 1928, so far as material, are substantially the same as Sections 212 (a) and 213 (a), respectively, of the Revenue Act of 1926, set forth above.

Treasury Regulations 69, promulgated under the Revenue Act of 1926:

> ART. 88. *Compensation of State officers and employees.*—Compensation paid to its officers and employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or political subdivision, including fees received by notaries public commissioned by States and the commissions of receivers appointed by State courts, is not taxable. Compensation received for services rendered to a State or political subdivision thereof is included in gross income unless (*a*) the person receives such compensation as an officer or employee of a State or political subdivision, and (*b*) the services are rendered in connection with the exercise of an essential governmental function. But see section 1211 as to 1924 and prior years.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

Article 643 of Regulations 74, so far as material, is substantially the same as Article 88 of Regulations 69, set forth above.

APPENDIX B

Massachusetts, Special Acts and Resolves, 1918:

Chap. 159. AN ACT TO PROVIDE FOR THE PUBLIC OPERATION OF THE BOSTON ELEVATED RAILWAY COMPANY

Be it enacted, etc., as follows:

SECTION 1. The board of trustees of the Boston Elevated Railway Company is hereby created, to consist of five persons to be appointed by the governor, with the advice and consent of the council. The persons so appointed shall be sworn before entering upon the performance of their duties; shall own no stock or other securities of the Boston Elevated Railway Company or of any company owned, leased, or operated by it; shall serve for the term of ten years from the date when they assume the management of the company as hereinafter provided and until their successors are duly appointed and qualified, and each shall receive from the company as compensation for his services five thousand dollars annually. In case of any vacancy in said board by reason of death, resignation or otherwise, the governor, by and with the consent of the council, shall fill the vacancy. The board shall designate one of the trustees so appointed to serve as chairman. Any member of the board may be removed for cause by the governor, with the advice and consent of the council.

Said trustees shall not be considered public officers within the meaning of section twenty-five of chapter five hundred and fourteen of the acts of nineteen hundred and nine, but shall be subject in all other respects to the provisions of said section to the same extent as are the directors of the Boston Elevated Railway Company, but said section shall not apply to recommendations by the governor to said trustees. The provisions of section one of chapter seven of the Revised Laws shall not apply to the said board.

If the public management and operation of the railway system of the Boston Elevated Railway Company shall continue beyond the original period of ten years the governor shall, with the advice and consent of the council, at the expiration of each ten-year period during the continuance of public management and operation, appoint five successor trustees to serve for a period of ten years and until their successors are appointed and qualified, but not exceeding the period of public management and operation. Said trustees shall assume the management and operation of the company's property on the first day of the month next following their appointment and qualification.

SECTION 2. Said board of trustees, hereinafter called the trustees, shall manage and operate the Boston Elevated Railway Company hereinafter called the company, and the properties owned, leased or operated by it, for a period of ten years, commencing on the first day of the month next after their appointment and qualification, and, subject to the provisions of this act, shall take and have possession of said properties in behalf of the commonwealth during the period of

public operation, and, for the purposes of this act, shall, except as is otherwise provided in this act have and may exercise all the rights and powers of said company and its directors, and, upon behalf of said company, shall receive and disburse its income and funds. They shall have the right to appoint and remove in their discretion the president, treasurer and clerk of the corporation, and all officers of the company other than the board of directors. They shall have the right to regulate and fix fares, including the issue, granting and withdrawal of transfers, and the imposition of charges therefor, and shall determine the character and extent of the service and facilities to be furnished, and in these respects their authority shall be exclusive and shall not be subject to the approval, control or direction of any other state board or commission.

In the management and operation of the said company and of the properties owned, leased or operated by it, as authorized by this act, the trustees and their agents, servants and employees shall be deemed to be acting as agents of the company and not of the commonwealth, and the company shall be liable for their acts and negligence in such management and operation to the same extent as if they were in the immediate employ of the company, but said trustees shall not be personally liable. A majority of the board shall constitute a quorum for the transaction of business, and the action of a majority of those present at any meeting shall be deemed the action of the trustees.

Nothing herein contained shall be held to affect the right of the commonwealth or any subdivision thereof to tax the company or its

stockholders in the same manner and to the same extent as if the company had continued to manage and operate its own property.

SECTION 3. The trustees shall have authority to make contracts in the name and on behalf of, and to issue stocks, bonds and other evidences of indebtedness of, the company. * * *

The trustees shall cause to be paid all amounts which may from time to time become due from the company, and shall declare dividends at the appointed times upon the preferred and common stock of the company, and provide for the payment of the same.

SECTION 5. The Boston Elevated Railway Company shall, prior to or at the time of its acceptance of this act, provide for raising three million dollars in cash by the issue of preferred stock at not less than the par value which shall be one hundred dollars per share. * * *

One million dollars shall be set aside as a reserve fund to be used only for the purposes hereinafter specified, and the remaining two million dollars shall be subject to the disposition of the trustees to pay for the cost of additions and improvements to the company's property.

SECTION 6. The trustees shall from time to time, in the manner hereinafter provided, fix such rates of fare as will reasonably insure sufficient income to meet the cost of the service, which shall include operating expenses, taxes, rentals, interest on all indebtedness, such allowance as they may deem necessary or advisable, for depreciation of property and for obsolescence and losses in respect to property sold, destroyed, or abandoned, all other expenditures and charges which under the laws of the commonwealth

now or hereafter in effect may be properly chargeable against income or surplus, fixed dividends on all preferred stock of the company from time to time outstanding, and dividends on the common stock of the company from time to time outstanding at the rate of five percent per annum on the par value thereof during the first two years, five and one half percent per annum on the par value thereof during the next two years and six percent per annum on the par value thereof during the balance of the period of public operation. * * *

SECTION 7. The trustees shall, within sixty days after their appointment and qualification, fix and put in operation rates of fare which in their judgment will produce sufficient income to meet the cost of the service as defined in section six, and within sixty days thereafter shall adopt and publish a schedule of eight different grades of fare, of which four shall be below and four above the rate of fare first established; and whenever by reason of any change in the existing rate of fare there are less than four grades, either above or below the rate then in force, the trustees shall forthwith adopt and publish a schedule of additional grades of fare so that there shall always be not less than four grades of fare above and below the existing rate of fare.

If at any time the trustees shall be of opinion that said rates of fare or schedule should be changed, either with regard to the method or basis upon which the fares and transfer privileges are established, or because the steps between the different grades are too small or too great, or for any other reason, the trustees may adopt, publish, and put in effect new schedules or rates of fare

to take the place of the existing schedule or rates of fare.

SECTION 8. The reserve fund shall be used only for the purpose of making good any deficiency in income as provided in section nine or for reimbursing the commonwealth as provided in sections eleven and thirteen, and until such use, may be invested in income-producing securities in the discretion of the trustees, and all income or interest received thereon shall be treated as part of the general income of the company.

SECTION 9. Whenever the income of the company is insufficient to meet the cost of the service as herein defined, the reserve fund shall be used as far as necessary to make up such deficiency, and whenever, on the other hand, such income is more than sufficient to meet the cost of the service, the excess shall be transferred to and become a part of the reserve fund.

SECTION 10. If, as of the last day of June in the year nineteen hundred and nineteen, or the last day of any September, December, March or June thereafter, the amount of the reserve fund shall exceed by thirty percent or more the amount originally established, and during the preceding three months the income shall have exceeded the cost of the service, the trustees shall within one month thereafter put into effect the next lower grade of fare that has been adopted as provided in section seven; and if, as of any such last day of June, September, December or March, the amount of the reserve fund shall be less than seventy percent of the amount originally established and during the preceding three months the income has been less than the cost of the service, the trustees shall within one month there-

after put into effect the next higher grade of fare, and the fare shall continue to be decreased or increased, as the case may be, subject to the same conditions, if the amount of the reserve fund is above or below said limits, as of such quarterly dates. In determining the amount of the reserve fund for the purposes of this section only there shall first be deducted therefrom any amounts which have been paid by the commonwealth to the company under the provisions of section eleven, and for which the commonwealth has not been reimbursed.

SECTION 11. If, as of the last day of June in the year nineteen hundred and nineteen, or the last day of any December or June thereafter, the amount remaining in the reserve fund shall be insufficient to meet the deficiency mentioned in section nine, it shall be the duty of the trustees to notify the treasurer and receiver general of the commonwealth of the amount of such deficiency, less the amount, if any, in the reserve fund applicable thereto, and the commonwealth shall thereupon pay over to the company the amount so ascertained. Pending such payment it shall be the duty of the trustees to borrow such amount of money as may be necessary to enable them to make all payments, including dividend payments, as they become due. If, as of the last day of any June or December thereafter during the period of public operation, the reserve fund shall exceed the amount originally established, the trustees shall apply the excess, so far as necessary, to reimbursing the commonwealth for any amounts which it may have paid to the company under the provisions hereof, and the commonwealth shall thereupon distribute the amount so received among the

cities and towns in which the company operates, in proportion to the amounts which they have respectively been assessed as provided in section fourteen.

In order to meet any payment required of the commonwealth under the provisions of this section the treasurer and receiver general may borrow at any time, in anticipation of the assessments to be levied upon the cities and towns, such sums of money as may be necessary to make said payments, and he shall repay any sums so borrowed as soon after said assessments are paid as is expedient.

SECTION 13. It shall be the duty of the trustees to maintain the property of the company in good operating condition and to make such provision for depreciation, obsolescence and rehabilitation, that, upon the expiration of the period of public management and operation, the property shall be in good operating condition. If the period of public management and operation expires, control of the property shall then revert to the company, and if at that time the reserve fund shall be less than the amount originally established because the income during the period of public management and operation has been insufficient to pay the cost of the service, the commonwealth shall forthwith pay over to the company an amount sufficient to restore it to its original amount; and if the amount in said reserve fund is then in excess of the amount originally established and any amount required to meet the cost of the service to the expiration of such period, such excess shall be paid into the treasury of the commonwealth and distributed among the cities and towns in which the company operates in the same

proportions as the assessments provided for by section fourteen.

SECTION 14. In case the commonwealth shall be called upon to pay to the trustees or the company any amount under the provisions of sections eleven and thirteen, such amount with interest or other charges incurred in borrowing money for the purpose shall be assessed upon the cities and towns in which the company operates by an addition to the state tax next thereafter assessed in proportion to the number of persons in said cities and towns using the service of the company at the time of said payment, said proportion to be determined and reported to the treasurer and receiver general by the trustees from computations made in their discretion for the purpose.

SECTION 15. Upon the termination of the period of public management and operation, the company shall manage and operate the property and may fix and collect such just and reasonable fares as will produce an income sufficient to pay the reasonable cost of the service as defined in section six, including dividends upon the common stock from time to time outstanding of six percent per annum on the par value thereof but no more, and may establish schedules of fares which shall automatically increase or decrease in the same manner as is authorized in the case of the trustees: *provided,* that the commonwealth shall be under no liability to make any payments to the company by reason of any deficiencies in income accruing after the discontinuance of public operation. The company shall thereafter be subject to public regulation and supervision in such manner as may be determined by the general court, but such regulation and supervision

shall not be exercised so as to reduce the income below the reasonable cost of the service as defined in this act.

SECTION 18. With the exception of section five, which shall take effect upon the passage of this act, this act shall take effect upon its acceptance by the holders of not less than a majority of all the stock of the Boston Elevated Railway Company and by the holders of not less than a majority of all the stock of the West End Street Railway Company, given at meetings called for the purpose, and the filing of certificates of acceptances with the secretary of the commonwealth, and the filing with the said secretary of a certificate, signed and sworn to by a majority of the directors of the Boston Elevated Railway Company, that the entire three million dollars of preferred stock provided for by section five has been subscribed for, and at least thirty percent of his subscription has been paid in in cash by each subscriber, and that no dividends have been declared or paid upon the company's common stock since the passage of this act.

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